

**BOARD OF ALIEN LABOR CERTIFICATION APPEALS
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.**

DATE: December 8, 2000
CASE NO: 2000-INA-237

In the Matter of:

BLACK DUCK CAFÉ
Employer,

On Behalf of:

DONNA MARIA WATSON
Alien

Appearance: Judith B. Sporn, Esq.
for the Employer and the Alien

Certifying Officer: Raimundo A. Lopez
Boston, Massachusetts

Before: Holmes, Vittone and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Donna Maria Watson ("Alien") filed by Employer Black Duck Café. ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182 (a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, Boston, Massachusetts denied the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 CFR § 656.27(c).

STATEMENT OF THE CASE

On December 22, 1997, the Employer filed an application for labor certification to enable the Alien to fill the position of Cook for its Restaurant. The duties of the job offered were described as follows:

Prepares, seasons and cooks meals, including main dishes, appetizers and desserts. Orders food from suppliers, uses variety of kitchen utensils. Portions food on serving plates.
***11am-2pm and 5pm-10pm.

The wages were \$13.71 per hour, no education was required, and 2 years experience in the job was required. 13 U.S. applicants were referred. (AF-16-62)

On November 8, 1999 the CO issued a NOF proposing to deny certification, finding that the job offer was responded to by two applicants in particular who seemed qualified for the position. In order to rebut, Employer must demonstrate that both applicants were contacted. This information should consist of telephone records and registered mail receipts. (AF-14-15)

On January 14, 2000 Employer forwarded a rebuttal stating in its entirety: "In response to your Notice of Findings, both John Lowman and Clinton Gee were repeatedly unavailable by telephone. I do not have registered mail receipts. I have checked (m)y records, and have disposed of the telephone bills for the time period in question. I have requested copies of the bills, but have not yet received them. I would be willing to provide the records at such time as I receive them." (AF-10-11)

A Final Determination was issued by the CO on January 21, 2000. Labor certification was denied since Employer had failed to submit evidence that he had actually contacted U.S. applicants Lowman and Gee by telephone despite being given a total of 70 days to obtain records of telephone calls. Nor did Employer

attempt to contact applicants by mail. Due to employer's failure to show good faith in recruitment by not submitting requested evidence to support his efforts at contacting qualified applicants Labor Certification was denied. (AF-8,9)

Employer, February 22, 2000 requested reconsideration of the Final Determination and enclosed copies of telephone records as well as contemporaneous notes. The CO, on February 24, 2000 rejected Employer's motion. Employer, on February 29, 2000 requested review of the Final Denial. (AF-1)

Discussion

The regulations provide in 656.21(b)(6) that if U.S. workers have applied for the job opportunity, an employer must document that they were rejected solely for lawful, job-related reasons. Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. workers. Therefore, an employer must take steps to ensure that it has rejected U.S. applicants only for lawful, job-related reasons. The employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. Cathay Carpet Mill, Inc., 1987-INA-161 (Dec. 7, 1988) (en banc).

The CO gave Employer adequate opportunity, including an extension of time, to obtain documentation of its attempts, if any, to contact U.S. applicants Gee and Lowman. An Employer must document its reasonable efforts to contact qualified U.S. workers. Churchill Cabinet Co., 1987-INA-539 (Feb. 17, 1988). The CO, moreover, was well within his discretion to deny Employer's motion for reconsideration since such motions need be entertained only with respect to issues which could not have been addressed in rebuttal. Harry Tancredi, 1988-INA-441.

ORDER

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

